



State of West Virginia
Office of the Attorney General
State Capitol
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Attorney General

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May 18, 2016

West Virginia Superintendent of Schools
West Virginia Department of Education
All County Boards of Education

Re: Federal Guidance Letter on Transgender Students

Dear Superintendent of Schools, Members of the West Virginia Department of Education, and Members of County Boards of Education:

As you are aware, President Obama's Department of Education and Department of Justice issued last week a "significant guidance letter" purporting to establish that federal law requires the schools of the State of West Virginia to admit students of one biological sex to the bathrooms, locker rooms, dormitories, or sports teams of the other biological sex. This letter appears to extend to "gender identity" the prohibition on "sex" discrimination that applies under Title IX to all schools and colleges that receive federal funding. According to the letter, our schools must treat "a student's gender identity as the student's sex"—or else lose all federal monies under Title IX.

As the chief legal officer of our State, I write to assure you that this letter is not the law. Contrary to its assertions, this letter does not simply interpret existing law; it seeks to unilaterally redefine and significantly expand Title IX's protections pertaining to "sex" to include "gender identity." Title IX and its implementing regulations provide protections only on the basis of "sex"—a term that has been well-understood since Title IX's passage in 1972 to refer to the biological categories of male and female. Indeed, they expressly allow different facilities for males and females. Unlike some laws passed in recent years, neither Title IX nor its regulations say anything about "gender identity." The letter is both procedurally and substantively unlawful.

The letter purports to find support in existing court precedent, but no court has ever ruled that schools are required to make these many, wide-ranging changes to their facilities and

West Virginia Superintendent of Schools,
West Virginia Department of Education,
All County Boards of Education
May 18, 2016
Page 2

programs. The recent decision by two judges on the U.S. Court of Appeals in Richmond in *G.G. v. Gloucester County School Board* did not address the legality of a federal edict as sweeping as last Friday's letter. Moreover, that decision is still subject to challenge; indeed, my Office led nine States in a brief filed last week supporting further review by all fifteen judges on that court.

The fact of the matter is that the President is seeking to use school funding as leverage to force his ideas onto our parents, students, and communities. The President would allow any person of either sex to enter the bathrooms, locker rooms, changing areas, dormitories, and athletic teams of the other sex, and he has determined to use the power of the federal government to bully the rest of the country into accepting his particular worldview.

This issue isn't about discrimination; rather, it is about federal overreach. As you know, practical accommodations can be worked out as necessary for transgender students, such as single-stall, unisex restrooms.

School policies should be set at the local level—not by presidential decree. As your Attorney General, I also do not set school policy, but I am duty-bound to protect our state from unlawful federal overreach and therefore strongly urge you to consider that this federal “guidance” has no force of law. Do not allow the President's effort to unilaterally change the 40-year-old terms under which we accepted federal school funding—a naked bait-and-switch—to intimidate you. You should be aware that several schools that have permitted students to access facilities of the other biological sex are already being sued by parents and students for invasions of the rights of other students.

I will vigorously fight this lawless federal overreach. Yesterday, together with the Attorney Generals of Oklahoma and Texas, I wrote to the federal government asking it to make clear that schools may continue to receive federal funding even if they do not adopt the policies contained in the guidance letter. In addition, if there is any attempt by any person to enforce this “significant guidance letter” on any school in the State of West Virginia, I will not hesitate to defend the position that federal law requires nothing of the kind.

Sincerely,

A handwritten signature in black ink that reads "PATRICK MORRISSEY". The signature is written in a cursive, slightly slanted style.

Patrick Morrissey
West Virginia Attorney General

CC:

West Virginia Superintendent of Schools,
West Virginia Department of Education,
All County Boards of Education
May 18, 2016
Page 3

Governor of the State of West Virginia
President of the West Virginia Senate
Speaker of the West Virginia House of Delegates